

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

HAROLD BARKLEY, CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
AND LOCKE BARKLEY, CHAPTER 13 TRUSTEE
FOR THE NORTHERN DISTRICT OF MISSISSIPPI,
ON BEHALF OF CERTAIN DEBTORS

PLAINTIFFS

V.

NO. 4:00CV196-B-B

FIRST FAMILY FINANCIAL SERVICES, INC.

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the plaintiffs' motion to remand. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

The defendant removed this cause on the grounds of bankruptcy jurisdiction under 28 U.S.C. § 1334(b)¹ and federal question jurisdiction.² The plaintiffs brought this action in state court on behalf of approximately 2,500 chapter 13 debtors to recover actual and punitive damages arising out of consumer loan agreements between the debtors and the defendant. The complaint alleges breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duties, civil

¹Under 28 U.S.C. § 1334(b), "district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

²The notice of removal asserts that the claims alleged in the complaint fall within the purview of the Truth-in-Lending Act [TILA], 15 U.S.C. § 1601, et seq. The complaint expressly seeks relief only under state common law and state statutes. TILA does not invoke the complete preemption doctrine and the defendant does not contend that any of the plaintiffs' state law claims are not viable under Mississippi law. *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366, 367 (5th Cir. 1995) (under the artful pleading doctrine, "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law").

conspiracy, fraudulent and negligent misrepresentation and/or omission, negligence and unconscionable practices under the Mississippi Uniform Commercial Code.

The plaintiffs move to remand on the grounds of lack of federal question jurisdiction³ and abstention.⁴ The court finds that the defendant properly removed this action pursuant to 28 U.S.C. § 1452(a).⁵ It is undisputed that this court has original but not exclusive subject matter bankruptcy jurisdiction under section 1334(b) since this action is, at least, "related to" pending chapter 13 bankruptcy proceeding filed by the debtors represented by the plaintiffs herein. *See In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987) ("related to" jurisdiction exists if "the outcome of [the instant] proceeding could **conceivably** have any effect on the estate being administered in bankruptcy") (citations omitted); *Allen v. City Finance Co.*, 224 B.R. 347, 352 (S.D. Miss. 1998) (for purposes of subject matter jurisdiction, a state court action for a loan company's alleged wrongful practices was "related to" the plaintiffs' bankruptcy cases since any "award would have the effect of increasing property of the bankruptcy estates").

The plaintiffs contend that this cause must be remanded on the ground of mandatory abstention

³In opposition to the instant motion, the defendant does not address the issue of federal question jurisdiction under 28 U.S.C. § 1331. For the reasons stated in note 2, *supra*, the court finds that the complaint does not invoke federal question jurisdiction.

⁴The bankruptcy doctrines of mandatory and discretionary abstention apply to removed cases. *In re Southmark Corp.*, 163 F.3d 925, 929 (5th Cir. 1999) .

⁵Under 28 U.S.C. § 1452(a), "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

⁶28 U.S.C. § 1334(c)(2) provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Only non-core proceedings, i.e., "proceedings 'related to a case under title 11,' but not 'arising under

under 28 U.S.C. § 1334(c)(2)⁶ or, in the alternative, this cause should be remanded on the ground of discretionary abstention under section 1334(c)(1).⁷ Mandatory abstention is not triggered unless the plaintiff makes an affirmative showing that the action can be timely adjudicated in a state court forum. *WRT Creditors Liquidation v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 605-606 (S.D. Tex. 1999) ("[a] naked assertion that the matter can be timely adjudicated in the state court, without more is insufficient to satisfy the requirement [of mandatory abstention]'" (citations omitted)). The plaintiffs assert that this cause "was ready to be heard in a timely manner in State Court" and that it "is much less a burden on the circuit court than many of the [cases involving multiple plaintiffs, including asbestos, pharmaceutical and other causes of action] which the Circuit Courts of Mississippi have heard."⁸ In *WRT Creditors Liquidation*, the court found that abstention was mandated since the plaintiff asserted that "the [state court] trial calendar is not congested" and that "a trial could commence in the state court within a year after filing in that court." *Id.* at 606, 613. *See In re Georgou*, 157 B.R. 847, 851 (N.D. Ill. 1993) (backlog of the state court calendar is pertinent to the timeliness requisite of mandatory abstention). The court finds that the plaintiffs' conclusory assertion that the case "was ready to be heard in a timely manner" before its removal does not invoke mandatory abstention.⁹

title 11, or arising in a case under title 11,'" are subject to mandatory abstention. *In re Gober*, 100 F.3d 1195, 1206 (5th Cir. 1996); *WRT Creditors Liquidation v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 606 (S.D. Tex. 1999) ("Related-to' matters are those which, because they are peripheral to the concerns of the bankruptcy case and based on extrinsic sources of law, require mandatory abstention.").

⁷28 U.S.C. § 1334(c)(1) provides:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding **arising under title 11 or arising in or related to a case under title 11.**

(Emphasis added).

⁸Plaintiffs' memorandum brief at 12-13; plaintiffs' rebuttal brief at 5.

⁹Therefore, the court need not determine whether this action qualifies as a core or non-core proceeding. *See supra* note 6.

The plaintiffs alternatively seek remand on equitable grounds pursuant to 28 U.S.C. § 1452(b)¹⁰ and § 1334(c)(1).¹¹ *Allen v. City Finance Co.*, 224 B.R. at 352-53 ("Some courts, when deciding whether to remand a case under § 1452(b), take into account whether abstention would also be possible.") (citing *O'Rourke v. Cairns*, 129 B.R. 87, 90 (E.D. La. 1991)). Even in the absence of an affirmative showing of timely adjudication in state court, discretionary abstention may be warranted where nothing in the record suggests that the action could not be timely litigated in state court. For purposes of considering the question of discretionary abstention in the instant cause, the court finds the following factors controlling: 1) "the effect or lack thereof on the efficient administration of the estate[s] if the Court recommends [remand or] abstention;" 2) "extent to which state law issue[s] predominate over bankruptcy issues;" 3) "jurisdictional basis, if any, other than § 1334;" 4) "the existence of a right to a jury trial;" 5) "the presence in the proceeding of nondebtor parties;" and 6) "comity." *Allen*, 224 B.R. at 353 (listing fourteen factors set forth in *Searcy v. Knostman*, 155 B.R. 699, 710 (S.D. Miss. 1993)).

The defendant challenges the plaintiff trustees' standing as to at least 110 debtors¹² on the ground that their bankruptcy cases are no longer pending. Since resolution of the standing issue may result in the addition of at least 110 nondebtor parties as plaintiffs, the court finds that the standing issue, albeit governed by the Bankruptcy Code, does not preclude abstention and remand. The court further finds that the substantive claims are based on state law and that state law issues clearly predominate over any bankruptcy concerns. With respect to judicial economy, the joinder of the state law claims of the subject debtors in this single action is more noteworthy than the number of bankruptcy proceedings

¹⁰28 U.S.C. § 1452(b) provides in part:

The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.

¹¹The doctrine of discretionary abstention applies to both core and non-core proceedings. *See supra* notes 7 and 9.

¹²Defense counsel's affidavit states that, based on a review of 765 of the approximate 2,500 bankruptcy cases at issue, 110 of the reviewed cases have been dismissed and/or closed.

that are still pending. In addition, this cause could not have been removed on any independent basis other than bankruptcy jurisdiction under § 1334 and the plaintiffs timely demanded a jury trial in state court. In the absence of any showing that remand would adversely affect the administration of the debtors' bankruptcy estates,¹³ the above-referenced factors, in conjunction with the factor of comity, weigh in favor of discretionary abstention and remand on equitable grounds. *In re Gober*, 100 F.3d 1195, 1206 (5th Cir. 1996) ("[u]nder the 'permissive abstention' doctrine, 28 U.S.C. § 1334(c)(1), courts have broad discretion to abstain from hearing state law claims").

For the foregoing reasons, the court, in its discretion, finds that it should abstain from hearing or referring this cause to the bankruptcy court pursuant to 28 U.S.C. § 1334(c)(1), and that the instant motion to remand should be granted pursuant to 28 U.S.C. § 1452(b). An order will issue accordingly.

THIS, the _____ day of March, 2001.

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE

¹³The defendant merely asserts that the bankruptcy court is capable of ruling on the state law claims and better equipped to address the standing issue.